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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL J. ONLEY,

Defendant and Appellant.

B281919

Los Angeles County  
Super. Ct. No. BA387967

APPEAL from a judgment of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Affirmed with directions.

Peter Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

This is defendant Michael Onley's second appeal after he was convicted by a jury of the first degree murder of Andrew Todd Cherry and sentenced to life in prison without the possibility of parole. (See *People v. Diaz* (Apr. 15, 2016, B258629) [nonpub. opn.] (*Diaz*).) In the first appeal, we concluded substantial evidence supported Onley's murder conviction, but we reversed his judgment because the trial court abused its discretion in denying his motion to represent himself at the sentencing hearing under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). We remanded the matter for the limited purpose of providing Onley a new hearing on his *Faretta* motion. We also directed the court to strike Onley's parole revocation restitution fine.

On remand, the court granted Onley's *Faretta* motion. Onley subsequently filed a motion for a new trial, arguing, among other things, that: (1) the People violated his due process rights by failing to disclose certain items of evidence before trial; and (2) the prosecutor committed misconduct during her closing argument when she argued facts that Onley claims were not supported by the evidence. The court denied Onley's new trial motion, reinstated Onley's judgment, and re-imposed Onley's sentence of life in prison without the possibility of parole. The court did not, however, strike Onley's parole revocation restitution fine. We affirm the judgment with directions for the court to strike Onley's parole revocation restitution fine.

## FACTUAL BACKGROUND<sup>1</sup>

### The Prosecution's Case-in-Chief

#### 1. The burglary, robbery, and shooting

In January 2011, Donovan Diaz and Onley were living together, and Diaz was dating Porscha Chambers. On January 22, 2011, Chambers went to Diaz and Onley's apartment.<sup>2</sup> Ryan Whitmore, whom Diaz had met earlier that day, was also at the apartment. Diaz, Chambers, and Whitmore decided to go to a party. Diaz drove them to a gas station, where they met Andrew Todd Cherry. While Diaz and Cherry talked, Chambers went to a store across the street to buy a bottle of alcohol. Diaz, Chambers, and Whitmore then went to Cherry's house to hang out before the party.

Cherry lived by himself, but he owned a parrot that talked. He sold clothes, electronics, and marijuana out of his house. When they arrived at Cherry's house, Chambers, Diaz, and Whitmore drank alcohol and smoked marijuana, and Whitmore also smoked Phencyclidine (PCP).

While at Cherry's house, Chambers allowed Diaz to use her phone to make several calls. Diaz became fidgety after using Chambers's phone. Diaz then asked Chambers to go to the store to buy some blunts so that they could smoke marijuana. When

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<sup>1</sup> We adopt the factual summary from our prior unpublished opinion in *People v. Diaz, supra*, B258629.

<sup>2</sup> Chambers also knew Onley and Moore. She testified that she knew Diaz by the name "Dorian," Onley by the name "Scrilla," and Moore by the name "No Good."

Chambers returned about five minutes later, Diaz asked her to go back outside to grab something from his car, which was parked near Cherry's house. When she went outside, Chambers saw Onley and Octivan Moore standing under a tree.

Chambers then received a call from Onley, who asked for Diaz. Chambers replied that Diaz was inside Cherry's house. Onley and Moore then pulled hoods over their heads and walked toward the house. As Onley and Moore approached the house, Whitmore was trying to leave through the front door.<sup>3</sup> Onley and Moore tried to pull her inside the house with them, but she broke free. Onley and Moore then entered the house and closed the front door.

While Whitmore was outside, she heard what sounded like popping balloons, firecrackers, or gunshots. She then ran away from Cherry's house, and Chambers tried to follow her. Chambers eventually stopped following Whitmore and returned to Diaz's car. She then saw Diaz, Onley, and Moore leave the house carrying white bags or pillowcases that appeared to be stuffed with items. Diaz returned to his car, and Onley and Moore got into a different car. Diaz and Chambers then went looking for Whitmore. They found her outside of a nearby church, and Diaz told her to get into his car.

Diaz then drove Chambers and Whitmore to a party. Chambers and Whitmore stayed in the car while Diaz went inside for about 15 minutes. After leaving the party, Diaz dropped Whitmore off at a house and drove Chambers and himself to a motel room, where they met Moore who was with an

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<sup>3</sup> During her cross-examination, Whitmore testified that the men she struggled with were bald.

unknown woman. After about 45 minutes, Moore and the woman left the motel room, and Diaz and Chambers stayed in the room until the next morning.

After leaving the motel, Chambers told Diaz that she was worried that her fingerprints would be found inside Cherry's house. Diaz told her not to worry because he had "got it already." During another conversation after they left the motel, Diaz told Chambers that he had returned to Cherry's house on January 23, 2011, and found Cherry lying face-down on the ground. He also told her that "they" had robbed Cherry, that he had Cherry's computer, and that "they" had killed Cherry's bird because it talked too much.

## **2. The discovery of Cherry's body**

Before January 22, 2011, Cherry spoke to his family on a daily basis. However, between the evening of January 22 and the afternoon of January 24, 2011, Cherry did not speak to or contact any of his family members.

Cherry spoke to his mother every day; he took her to and from work and called her at night to check on her. Cherry last spoke to his mother around 8:30 p.m. on January 22, 2011. He also regularly spoke to his sister, brother-in-law, and brother, and he would often take his daughter to school in the morning.

Cherry and his family had planned to throw Cherry's son a birthday party on Sunday, January 23, 2011. Cherry, however, never showed up to the party or told anyone that he was not coming. During the morning of January 23, 2011, Cherry's mother tried calling him several times, but he never answered his phone. Cherry's sister also tried calling him, but he did not answer her calls either. Cherry's brother went to Cherry's house twice that day, but Cherry never answered the door.

On Monday, January 24, 2011, Cherry was supposed to drive his mother to work and his daughter to school, but he never contacted either of them. His sister tried calling him that morning, but he did not answer his phone. His sister, brother-in-law, and brother then went to his house around noon.

All doors to Cherry's house were locked, so Cherry's brother and brother-in-law forced open the front door. They found Cherry, non-responsive, lying face down in a puddle of blood, with his hands tied behind his back and his feet bound by a jump rope. Cherry had suffered seven gunshot wounds: four to the back of his head, one to his neck, and two to his legs. Nine expended .22-caliber bullet cartridges were found near Cherry's body and throughout his living room. Blood had pooled around Cherry's body, and there was blood on the ground in the living room, the kitchen, the hallway to a bedroom, and near the front door.

Law enforcement officers found no signs of forced entry at Cherry's house, aside from the front door that Cherry's brother and brother-in-law had forced open. The inside of the house, however, looked like it had been ransacked. Some of the furniture in the living room was overturned. A computer cable in the living room had been cut and the corresponding computer was missing. A dead bird with a broken neck was found in the kitchen, and some of the bird's feathers were found in the living room. The officers also found a large amount of cocaine base, a white powder, a green leafy substance, and a digital scale in the living room.

Several fingerprints were found throughout the house. A fingerprint that matched Diaz was found on the frame to the front door, and two prints that matched Whitmore were found on

a mug inside the house. Onley's and Moore's fingerprints were not found at Cherry's house.

### **3. The investigation**

#### **3.1. The time of Cherry's death**

A coroner began examining the crime scene and Cherry's body around 6:15 p.m. on January 24, 2011. Cherry weighed approximately 320 pounds at the time of the examination. The coroner observed that by the time he started his examination, the blood that had pooled around Cherry's body had started to dry and Cherry's body had begun to decompose, indicating that Cherry had died between 24 and 48 hours earlier.

The coroner also compared the ambient temperature of the inside of Cherry's house with the temperature of Cherry's liver. As of 6:45 p.m., the ambient temperature in Cherry's house was 69 degrees, and the temperature of Cherry's liver was 75 degrees at 6:55 p.m. According to the coroner, the temperature of the human body typically starts to decrease from 98.6 degrees at a rate of 1.5 degrees per hour after death. However, environmental factors, such as the temperature of the area in which the body is located and the weight of the body, can affect the rate at which the body's temperature decreases. For example, a large, heavy body will cool down at a much slower rate than a small, thin body. Although a body's temperature could decrease more than 24 degrees over a 24- to 48-hour period, Cherry's weight and the fact that his body was lying on carpet could have slowed the rate at which his body's temperature decreased.

The coroner also observed that Cherry's body was not in rigor mortis at the time of the examination. According to the coroner, rigor mortis typically sets in about 12 hours after death

and completely dissipates about 24 hours after death. When he conducted his examination, the coroner needed to use very little pressure to break the stiffness of Cherry's body, further indicating that Cherry had died at least 24 hours earlier. Based on his observations of the crime scene and Cherry's body, the coroner concluded that Cherry died between 24 to 48 hours before his body was examined.

On January 27, 2011, a medical examiner conducted an autopsy of Cherry's body. He concluded that Cherry was killed by the four gunshots to his head. The medical examiner could not, however, determine an exact time of death. He testified that it is very difficult to pinpoint a time of death based on a post-mortem examination of a body. According to the medical examiner, many factors affect the time-of-death determination, including the condition of the body, the environmental conditions in which the body was found, and evidence of the last time the victim was seen alive. Based on his own observations and those made in the coroner's report, the medical examiner concluded that Cherry had died between 10 and 48 hours before the time his body was first examined on January 24, 2011.

### **3.2. Whitmore's statements to the police**

On July 19, 2011, Detective Young Mun<sup>4</sup> of the Los Angeles Police Department (LAPD) detained Whitmore for questioning about Cherry's murder. Whitmore's interview was recorded and played to the jury.

Whitmore initially denied knowing who Cherry was or having gone to his house. However, she eventually told the police

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<sup>4</sup> Detective Mun was the prosecution's lead investigator at trial.



that a man and a woman, whom she had met on January 22, 2011, but whose names she did not know, took her to Cherry's house to hang out, drink, smoke, and watch a movie. The man who drove her to Cherry's house was driving a gold sports utility vehicle. At some point while she was at Cherry's house, she went outside to retrieve her purse. The woman with whom she went to Cherry's house was already outside. While they were outside, Whitmore saw two men walk toward the house. The men tried to pull Whitmore back inside the house, but she pulled free and stayed outside. She then heard what she thought were gunshots from inside the house. She became scared and ran to a nearby church. The man and woman who took Whitmore to Cherry's house later found her at the church and forced her into the man's gold sports utility vehicle. They then dropped her off at an unknown location.

At the end of her interview, the police showed Whitmore a group of photographs of different men. She identified Diaz as the man who drove her to Cherry's house and forced her into his car after she left the house. On August 15, 2011, Whitmore was shown another group of photographs and identified Chambers as the woman with whom she went to Cherry's house.

### **3.3. Chambers's statements to the police**

On August 18, 2011, Chambers and Diaz were arrested together while Diaz was driving a gold sports utility vehicle. Detective Mun interviewed Chambers about Cherry's murder later that day.<sup>5</sup> Portions of Chambers's interview were played for the jury.

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<sup>5</sup> The police later helped Chambers move to a new home.

Most of Chambers's statements to the police were consistent with the testimony she later gave at trial. However, there were some differences between her statements to the police and her testimony. For example, during the beginning of her interview, she denied knowing what happened to Cherry on the night she went to his house, claiming that she left his house early because she felt sick and had started to vomit.

During the interview, Chambers recounted a conversation she had with Diaz the day after they went to Cherry's house, in which Diaz described what happened while he was inside the house with Onley and Moore. She said, "[Diaz] told me that they have robbed [Cherry] or whatever . . . . [¶] He was like, you don't know the dude. No-Good, he said that he think the dude No-Good, shot him or whatever. I'm like how you don't know if you shot him or not, he's like my head was down. I'm like how you don't know? It's a sound, there's no way that you cannot hear a gunshot, you know I'm saying, so how you don't know if he dead or not? He just talking about they hurried up and made me leave."

At the end of the interview, Chambers identified Onley from a photographic lineup. She told the police that Onley was Diaz's brother and that he was one of the two hooded men she saw enter Cherry's house on the night Cherry was killed. On September 27, 2011, Chambers identified Moore from a different photographic lineup. She identified Moore as the man called "No-Good," and she confirmed that he was the other man with Onley and Diaz on the night defendants robbed Cherry.

### **3.4. Electronic evidence**

#### **3.4.1. Onley's electronic monitoring device**

In January 2011, Onley was wearing an ankle monitor containing a global positioning system tracking device that the California Department of Corrections and Rehabilitation used to track his movements. The monitor was tracking Onley's movements on January 22, 2011, the night defendants robbed Cherry, as well as on January 23, 2011.

Around 9:07 p.m. on January 22, 2011, Onley was near a tree in front of Cherry's house. Onley then moved inside Cherry's house, where he remained from 9:10 p.m. to 9:17 p.m. Data from Onley's monitor and two of Cherry's cell phones showed that after Onley left Cherry's house, Onley and Cherry's phones travelled together in the same direction for more than an hour, indicating that Onley had taken Cherry's phones from the house.

Data from Onley's monitor also showed that at around 8:18 p.m. on January 23, 2011, Onley went back to Cherry's house. Onley remained at Cherry's house until 8:30 p.m. Around 8:35 p.m., he returned to his own home a few blocks away from Cherry's house.

#### **3.4.2. Cellphone records**

The prosecution also introduced records for the cell phones defendants used around the time of Cherry's murder. Although defendants did not use any cell phones registered in their names, statements from other witnesses established that defendants had used other people's phones to communicate with each other before and after they entered Cherry's house on January 22, 2011. Chambers testified that she had allowed Diaz to use her cell phone several times on January 22, 2011. Deserie Sherlock,

who was working as a prostitute around the time of Cherry's murder, testified that a Black male had stolen her phone sometime between August 2010 and June 2011.

On January 22, 2011, around the time Moore and Onley were seen at Cherry's house, Chambers's phone received several calls from a phone number registered in Sherlock's name. On January 28, 2011, Moore's roommate received several phone calls from the phone registered in Sherlock's name.

The prosecution's cellphone expert testified about the locations of Chambers's and Sherlock's phones on the evening of January 22, 2011. At 8:12 p.m., Chambers's phone communicated with a cell tower located near Cherry's house, and Sherlock's phone communicated with a cell tower located near Moore's house. Between 8:27 p.m. and 9:09 p.m., Chambers's phone continued to communicate with the cell towers located near Cherry's house. At 8:29 p.m., Sherlock's phone began to communicate with cell towers located near Cherry's house, and it continued to do so until 9:44 p.m. Data from Onley's ankle monitor showed that Onley was moving along the same path as Sherlock's phone.<sup>6</sup>

## **Defense Evidence**

### **1. Cherry's neighbors**

Defendants introduced the testimony of several of Cherry's neighbors who either claimed to have seen Cherry alive, or heard

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<sup>6</sup> The prosecution also introduced the testimony of a gang expert to support the gang allegations. We do not summarize that evidence because the jury did not reach a true finding as to the gang allegations, and defendants do not raise any issues for which that evidence is relevant.

sounds like fireworks or gunshots in the neighborhood, on January 23, 2011, the day after defendants robbed Cherry. Linda Page, who lived on Cherry's street, had grown up with Cherry, his brother, and defendants. Although Cherry and his brother were twins, she could tell them apart. She saw Cherry and another woman at a liquor store near Cherry's house around 11:00 p.m. on January 23, 2011. Cherry bought her a beer.

Lucy Gardner was also one of Cherry's neighbors. She had known Cherry since he was a teenager. She thought of him like her "son," and Cherry would often refer to her as "Momma Lucy." She also could tell Cherry and his brother apart. She saw Cherry and another man at a liquor store around 1:00 p.m. or 2:00 p.m. on January 23, 2011. Cherry greeted her and told her that he would see her later. When Gardner returned home from the liquor store, Cherry pulled up in front of her house and said, "Momma, I see you later on. Do you want anything?" She replied no, and Cherry left. Cherry returned to her house around 8:00 p.m. that night to ask her if she wanted him to buy her any food.

Melba Thompson, who lived a few houses away from Cherry, heard fireworks around 9:30 p.m. or 10:00 p.m. the night before Cherry's body was found. She did not hear any firecrackers or gunshots on January 22, 2011. Thompson did not know Cherry or Chambers, but she did recognize Chambers from the neighborhood. Thompson had seen Chambers come and go from Cherry's house on several occasions. She also saw Chambers ride by Cherry's house in a car with hydraulics on the morning of January 23, 2011.

Freddie Williams, another one of Cherry's neighbors, told the police that he had seen Cherry in front of Cherry's house

between 10:00 a.m. and 11:00 a.m. on January 23, 2011.<sup>7</sup> Cherry, who was with another man at the time, invited Williams to his house for a beer.

## **2. Expert testimony**

Diaz called Ronald Markman, a psychiatrist, who testified about the potential effects of PCP, marijuana, and alcohol on a person's memory and mental acuity. Dr. Markman testified that PCP can distort a person's emotions and ability to think, perceive, and act. Specifically, PCP can cause a person to suffer hallucinations and delusional thoughts. PCP can also produce conditions that "mimic" schizophrenia. Depending on a person's history of using PCP and the concentration of PCP used on a particular occasion, the drug can significantly affect that person's ability to accurately perceive what is going on around her. Dr. Markman also testified that using marijuana can negatively affect a person's short-term memory. Finally, Dr. Markman testified that drinking a pint of gin could affect a person's ability to perceive and remember events. However, he also testified that the extent to which a person's perception and memory would be impaired by consuming alcohol on a particular occasion depends on that person's history of consuming alcohol. If the person frequently drinks, she will develop a higher tolerance

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<sup>7</sup> Freddie Williams did not testify because he died before trial. His statements were introduced through Detective Mun's testimony. Detective Mun testified that at the time he interviewed Williams shortly after Cherry's body was discovered, Williams's speech was slightly slurred and there were several prescription medication bottles in Williams's home.

to alcohol, and the amount of alcohol needed to impair her perception and memory will increase.

## **PROCEDURAL BACKGROUND**

### **1. The Murder Charges, Trial, and Sentencing**

By a second amended information, the People charged Onley, Diaz, and Moore with Cherry's murder (Pen. Code,<sup>8</sup> § 187, subd. (a)). The information alleged each defendant committed the murder while engaged in the crimes of robbery and burglary (§ 190.2, subd. (a)(17)(A) & (G)) (special circumstance allegation). The information further alleged Onley, Diaz, and Moore committed the murder for the benefit of, at the direction of, and in association with, a criminal street gang (§ 1192.7, subd. (c)(28)) (gang allegation). Finally, the information alleged that a principal personally and intentionally discharged a firearm in the commission of the murder (§ 12022.53, subds. (d) & (e)(1)) (firearm use allegation).

Onley, Diaz, and Moore were tried by the same jury. The jury found each defendant guilty of murder, and it found true as to each defendant the special circumstance allegation and the firearm use allegation. The jury found not true the gang allegation as to each defendant.

The court sentenced Onley, Diaz, and Moore each to a term of life in state prison without the possibility of parole. The court then vacated the firearm use allegation and ordered each defendant to pay a \$300 parole revocation restitution fine under section 1202.45. As to each defendant, the court stayed its restitution order.

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<sup>8</sup> All undesignated statutory references are to the Penal Code.

## **2. Onley's First Appeal**

Onley, Diaz, and Moore appealed their convictions. On April 15, 2016, we issued *People v. Diaz, supra*, B258629, in which we affirmed Diaz's and Moore's convictions. Although we concluded substantial evidence supported Onley's conviction for first degree murder and rejected several of Onley's other claims of error, we reversed Onley's conviction after concluding the court abused its discretion in denying his *Faretta* motion. We remanded the matter for a new hearing on Onley's *Faretta* motion and directed the court to strike each defendant's parole revocation restitution fine.

## **3. Proceedings on Remand**

On October 5, 2016, the court granted Onley's *Faretta* motion. On October 20, 2016, the court appointed a paralegal to help Onley's trial counsel sort through and redact documents from Onley's trial and distribute them to Onley. The court also appointed a licensed investigator to help Onley obtain discovery for a new trial motion he intended to file.

On December 17, 2016, Onley received discovery from his trial counsel. Onley subsequently filed an informal discovery request seeking disclosure of the following items from the District Attorney's Office that were not included in the discovery materials Onley had received: (1) the audio or video recording of a January 25, 2011 interview between Freddie Williams and Detectives Mun and Garza; (2) the "Sprint subscriber information" associated with the telephone number (310) 237-8925, which was registered under Deserie Sherlock's name; and (3) "the name and telephone number of the computer shop Ms.



Porscha Chambers provided detectives with during her interview.”

Around January or February 2017, Onley filed a motion to compel compliance with his informal discovery request. Onley explained that he had repeatedly requested, without avail, that the prosecutor turn over the items identified in his informal discovery request. The court refused to compel discovery of the items listed in Onley’s request, noting that Onley’s trial counsel and the prosecutor had advised the court that they had turned over to Onley all the discovery materials in their possession.

On March 29, 2017, Onley filed a motion for a new trial. Among other things, Onley argued: (1) the People violated his due process rights and their disclosure obligations under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) when they did not disclose a copy of the recording of Williams’s January 25, 2011 police interview; and (2) the prosecutor committed misconduct during trial when she claimed in her closing argument that the evidence established Onley, Diaz, and Moore dragged Cherry through his home after shooting him several times in the legs, a claim Onley asserts was not supported by the evidence. Onley also argued his counsel rendered ineffective assistance by failing to “investigate” and object to “inadmissible phone evidence regarding witness Deserie Sherlock.”

On April 7, 2017, the trial court denied Onley’s motion for a new trial and resentenced him to life in prison without the possibility of parole. Among other fines and fees, the court re-imposed a \$300 parole revocation restitution fine. The court did not issue an amended abstract of judgment.

Onley filed a timely notice of appeal.

## **DISCUSSION**

### **1. Discovery Issues**

Onley contends his state and federal due process rights were violated when the People failed to disclose, and the court refused to compel the People to disclose, the following evidence: (1) the recording of Williams's January 25, 2011 interview with the police; (2) "Sprint subscriber information" for the phone registered in the name of Deserie Sherlock; and (3) identifying information for the computer store where Porscha Chambers claimed defendants took Cherry's property after they killed Cherry. Onley fails to explain, however, what relevance the identifying information for the computer store and the Sprint subscriber information for the telephone registered in Sherlock's name would have had to any issue at trial. Onley also fails to explain how he was prejudiced by the failure to disclose any of that evidence. We therefore limit our discussion to whether Onley's due process rights were violated by any failure of the People to disclose the recording of Williams's January 25, 2011 interview.

#### **1.1. Relevant Proceedings**

While investigating Cherry's murder, Detectives Mun and Garza interviewed Freddie Williams, one of Cherry's neighbors who claimed to have seen Cherry alive on January 23, 2011. They interviewed Williams on January 24 and January 25, 2011. As noted above, Williams died before trial.

Detective Garza testified at trial that he believed Williams's January 25, 2011 interview had been recorded, and a chronological report of the LAPD's investigation into Cherry's murder notes that the interview was recorded. A recording of the

interview was not introduced at trial, however. Instead, Detectives Garza and Mun testified about what Williams had told them based on their notes from Williams's interviews.

After the court granted his *Faretta* motion, Onley sought discovery of the recording of Williams's January 25, 2011 interview while preparing his motion for a new trial. A note that Onley had obtained from his trial counsel indicated that counsel had never obtained a copy of the recording, and the People denied that any recording of the interview existed when they responded to Onley's post-trial discovery requests.

At the April 7, 2017 hearing on Onley's motion for a new trial, the deputy district attorney who attended the hearing told the court that he had spoken to the prosecutor who handled Onley's trial about whether a recording of Williams's January 25, 2011 interview existed. The prosecutor who handled Onley's trial claimed she had recently spoken to Detective Garza, who denied that any recording of Williams's January 25, 2011 interview had ever been made. Detective Garza could not find a recording of the interview in the "murder book" from Onley's case, and he claimed that "as [the recording] was discussed at trial, that was in error." Before denying Onley's motion for a new trial, the court accepted the People's representation that no recording of the interview existed and told Onley he could raise the issue on appeal.

## **1.2. Applicable Law and Standard of Review**

A criminal defendant has a federal due process right to the disclosure of favorable evidence that is material to the issues of guilt and punishment. (*Brady, supra*, 373 U.S. at p. 87.) The prosecution, therefore, must disclose all material evidence that reasonably appears favorable to the defendant. (*In re Sassounian* (1995) 9 Cal.4th 535, 543.) This duty exists regardless of whether

the defendant makes any request for such evidence to be disclosed. (*Kyles v. Whitley* (1995) 514 U.S. 419, 433.)

“Favorable evidence” is evidence that is exculpatory to the defendant or that is damaging to the prosecution, such as evidence that impeaches a government witness. (*United States v. Bagley* (1985) 473 U.S. 667, 676; see also *In re Sassounian*, *supra*, 9 Cal.4th at p. 544; *People v. Uribe* (2008) 162 Cal.App.4th 1457, 1471–1472.) “Impeachment evidence” is any evidence that “may make the difference between conviction and acquittal.” (*Bagley*, at p. 676.) Evidence is material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” (*Id.* at p. 682.)

There are three components to a *Brady* violation: (1) the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the government, either willfully or inadvertently; and (3) the suppression of the evidence must have prejudiced the defendant. (*Strickler v. Greene* (1999) 527 U.S. 263, 281–282.) The defendant carries the burden of showing on appeal that there is a reasonable probability of a different result in the trial court had the evidence at issue not been suppressed. (*Banks v. Dretke* (2004) 540 U.S. 668, 699.)

“We independently review the question whether a *Brady* violation has occurred, but give great weight to any trial court findings of fact that are supported by substantial evidence.” (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 176 (*Letner and Tobin*).)

**1.3. Onley was not prejudiced by any failure to disclose the recording of Williams's interview.**

As a preliminary matter, we note that it is unclear whether the People failed to disclose the recording of Williams's January 25, 2011 interview, since the People claimed during Onley's new trial hearing that the interview was never recorded, and the court accepted the People's representation as credible. In any event, even if we were to assume that the People suppressed the recording of the interview, and that the contents of the interview would have been favorable to Onley's defense, Onley has failed to show there is a reasonable probability he would have obtained a different result at trial had the recording been disclosed. (See *Letner and Tobin, supra*, 50 Cal.4th at p. 176 [to establish a due process violation based on the government's suppression of evidence, the defendant must show " 'a reasonable probability of a different result' " ].)

Throughout trial, Onley and the other defendants claimed they could not have killed Cherry because they were at his house on January 22, 2011 and several of Cherry's neighbors had seen Cherry alive on January 23, 2011. Although defendants were not able to introduce a recording of Williams's interview, they did introduce the statements he made to Detectives Mun and Garza that were consistent with their defense. Specifically, the detectives testified that Williams had told them he spoke to Cherry around 10:00 a.m. or 11:00 a.m. on January 23, 2011, when Cherry invited him over for a beer.

As Onley acknowledges in his opening brief, defendants also called as witnesses Cherry's other neighbors, who corroborated Williams's account of seeing Cherry alive on January 23, 2011 and supported defendants' claims that they did

not kill Cherry. Specifically, Linda Page and Lucy Gardner testified that they had seen Cherry alive on January 23. For example, Gardner claimed she saw Cherry and another man at a liquor store in the early afternoon of January 23, only a couple of hours after the time Williams claimed Cherry invited him over for a beer. Page claimed Cherry bought her a beer at a liquor store in the late evening of January 23. Also consistent with this defense, Melba Thompson, another one of Cherry's neighbors, claimed she heard what sounded like gunshots or firecrackers on January 23; she denied hearing similar sounds on January 22.

Any recording of Williams's interview with Detectives Mun and Garza would therefore have been cumulative of other evidence introduced at trial that supported Onley's defense, including Williams's statements as conveyed by the detectives. Onley claims the recording was nevertheless material to his defense because it could have bolstered the credibility of Williams's statements, especially because the People tried to impeach Williams's credibility by introducing Detective Mun's testimony that he observed prescription medication bottles in Williams's home and that Williams's speech was slightly slurred during his interview. Generally, evidence that weighs on the credibility of a witness will be deemed material where the witness provided the only evidence that could establish the defendant's guilt or innocence, or “ “ “where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case, [citation].” ’ [Citation.]” (*Letner and Tobin, supra*, 50 Cal.4th at p. 177.)

Any value the recording of Williams's interview could have had in bolstering Williams's credibility would not have been material to Onley's defense. Even had the recording of Williams's

interview been introduced at trial, it is not reasonably probable that Onley would have obtained a different verdict since the jury heard other evidence that was entirely consistent with Williams's statements and nevertheless rejected the theory that Cherry was still alive the day after Onley and the other defendants went to his home.<sup>9</sup>

## **2. Prosecutorial Misconduct**

Onley next contends the court abused its discretion when it denied his motion for a new trial because the prosecutor committed misconduct during closing argument by arguing facts not supported by the evidence. Specifically, Onley asserts the prosecutor erroneously claimed that stains of Cherry's blood were found inside Cherry's home to support her argument that defendants had moved Cherry throughout his home after shooting him in the legs. Onley argues the prosecutor's statements were erroneous because "no evidence at trial established that the stains found at the scene were bloodstains, let alone that any bloodstains came from Mr. Cherry."

### **2.1. Relevant Proceedings**

At trial the People argued Onley, Diaz, and Moore were guilty of a special circumstance murder under section 190.2,

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<sup>9</sup> For the same reasons, any violation of state law for failing to disclose the recording of Williams's January 25, 2011 interview would have been harmless. (See *People v. Ashmus* (1991) 54 Cal.3d 932, 990 [whether the prosecution's discovery misconduct "violates state law only or implicates the United States Constitution ... is immaterial" because the standards for evaluating prejudice for both types of violations "are the same in substance and effect"], abrogated on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

subdivision (a)(17), because they had killed Cherry during the commission of a burglary or robbery. Consistent with this theory, the prosecutor stated during closing argument that defendants had shot Cherry several times in the legs, led him throughout his home while they gathered some of his belongings, and then tied his limbs before shooting him several times in the back of the head.

For instance, toward the beginning of her closing argument, the prosecutor stated Cherry had been shot several times in the legs and the back of the head. The prosecutor then asked a rhetorical question: “what happened between the first shots to the legs and the last shots to the head?” The prosecutor answered, “It’s very clear that he was forced throughout his home.” Diaz objected, arguing there was no evidence to support the prosecutor’s statement that Cherry had been moved throughout his home before being shot in the head because “nothing has been entered that says there were blood spots found on the rug.” Onley and Moore joined Diaz’s objection.

In response to defendants’ objections, the court instructed the jury as follows: “Ladies and gentlemen, what I’m going to do, in these types of—basically, counsel is making an objection that there is—the argument is this is outside of what was presented in the evidence. If you have any issue with respect to that, you can ask the reporter to read back, to the extent—to address that issue. And we will certainly search it out for you. You’ll get forms, blank forms. You can propound a question to the court with respect to that.”

The prosecutor continued her argument, “You heard the testimony of the officers, throughout the scene—that there was blood throughout the home, bloody footprints.” Diaz objected,



arguing the prosecutor's statement was not supported by the evidence. The court overruled Diaz's objection. Later, the prosecutor stated that Detective Ferreria had testified "that there was a trail of blood throughout [Cherry's] home," and that "blood was trailed throughout the house before [Cherry] received those fatal wounds." The prosecutor concluded this portion of her argument by asserting that "[t]he evidence is overwhelming that [Cherry] was killed during a robbery and a burglary."

## **2.2. Applicable Law and Standard of Review**

"The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' ' ' [Citation.]" (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

A prosecutor enjoys wide latitude during closing argument. (*People v. Williams* (1997) 16 Cal.4th 153, 221.) The prosecutor's argument may be vigorous and incorporate appropriate epithets as long as it amounts to fair comment on the evidence, and it may include reasonable inferences drawn from the evidence. (*Ibid.*) "[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) " 'In conducting this

inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements. [Citation.]’ ” (*People v. Brown* (2003) 31 Cal.4th 518, 553–554.)

A defendant may move for a new trial on the ground that the prosecutor committed prejudicial misconduct during trial. (§ 1181, subd. 5.) “ ‘We review a trial court’s ruling on a motion for a new trial under a deferential abuse-of-discretion standard.’ [Citations.] ‘ “A trial court’s ruling on a motion for new trial is so completely within that court’s discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion.” ’ [Citations.]” (*People v. Thompson* (2010) 49 Cal.4th 79, 140.)

### **2.3. The Court Properly Denied Onley’s New Trial Motion.**

Onley argues the trial court should have granted his motion for a new trial because (1) the prosecutor committed prejudicial misconduct when she claimed investigators found Cherry’s bloodstains throughout Cherry’s home; and (2) the court erred when it overruled defendants’ objections to the prosecutor’s argument. According to Onley, “[t]he prosecution simply failed to present any serologist or other expert who testified that the stains tested positive for blood or that DNA analysis showed the stains derived from Mr. Cherry.” Onley insists that “[w]ithout such expert testimony about the nature of the stains, the prosecutor could not legitimately tell the jury that they were bloodstains belonging to Mr. Cherry.” This argument lacks merit.

There was ample evidence introduced at trial to support the prosecutor’s argument that the blood found in Cherry’s home belonged to Cherry, and that Cherry had been moved throughout

his home after defendants shot his legs. Robert Fierro, an investigator with the Coroner's office, went to Cherry's home shortly after Cherry's body was discovered. Fierro observed that Cherry had suffered several gunshot wounds to the legs and head. Fierro found dried blood on the soles and one of the heels of Cherry's feet. Fierro also found blood near the wounds to Cherry's right leg and head, on Cherry's shirt, and on the carpet below Cherry's body.

Detective John Ferreria found a substance that appeared to be blood near one of the spent bullet casings found inside Cherry's home. Ferreria testified that there appeared to be a footprint in one of the bloodstains, as well as droplets of blood, "around that area,"<sup>10</sup> and he found blood on the bottom of Cherry's feet. Ferreria also testified that he found what appeared to be blood "[i]n the area of the entrance, kitchen, the short hallway that leads into the single bedroom, so one, two, three, four areas that I noted." All of this evidence is consistent with the prosecutor's argument.

We also reject Onley's claim that the prosecutor committed misconduct by relying on Fierro's and Ferreira's testimony because the People did not also call a serologist or some other expert to verify that the blood found in Cherry's home actually belonged to Cherry. First, Onley fails to cite any relevant authority to support this claim.<sup>11</sup> Second, the circumstances

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<sup>10</sup> The court overruled Diaz's objection to Ferreria's testimony that he found a footprint in the blood.

<sup>11</sup> Onley's reliance on *People v. Coleman* (1988) 46 Cal.3d 749 (*Coleman*) is misplaced. In *Coleman*, the California Supreme Court reiterated the rule established in *People v. Kelly* (1976) 17 Cal.3d 24, 30, that "evidence of a scientific test should not be admitted unless the

surrounding the discovery of Cherry's body, on their own, support an inference that the blood found in Cherry's home belonged to Cherry. Fierro observed several gunshot wounds on Cherry's body, and he found blood on and near several of those wounds. In addition, there was no evidence that someone other than Cherry had been injured inside the home.

In sum, the prosecutor's argument concerning the evidence of bloodstains found inside Cherry's home fell well within the scope of permissible argument. The court therefore properly overruled defendants' objections to that part of the prosecutor's argument and denied Onley's motion for a new trial on that ground.

### **3. The Parole Revocation Restitution Fine**

In *Diaz*, we concluded the court erred when it ordered Onley, Diaz, and Moore each to pay a \$300 parole revocation restitution fine under section 1202.45, since none of the defendants received a sentence that "includes a period of parole," a prerequisite for imposing the parole revocation fine. (See § 1202.45, subd. (a).) We directed the court to correct defendants' abstracts of judgments and the court's sentencing minute orders by striking the orders imposing parole revocation restitution fines.

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scientific basis for the test and its reliability are generally recognized by competent authorities." (*Coleman*, at pp. 774–775.) The court in *Coleman* held that results of a "hemostick" test used to verify the existence of blood at a crime scene should not have been admitted at trial because the prosecution did not properly verify the scientific basis for, and reliability of, that test. In this case, the People did not introduce the results of a scientific test used to verify the existence or source of any blood. Accordingly, *Coleman* has no application here.

On remand, when the court resentenced Onley, it re-imposed the \$300 parole revocation restitution fine. We therefore direct the court to correct its April 7, 2017 sentencing minute order by striking the order imposing a parole revocation restitution fine and to issue a corrected abstract of judgment.

### **DISPOSITION**

The judgment is affirmed. Upon issuance of the remittitur in this case, the court is directed to correct the April 7, 2017 minute order by striking the parole revocation restitution fine, to issue a corrected abstract of judgment, and to send a certified copy of the corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

### **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.